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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 KENNETH OZUA,

12 Petitioner,

13 v.

14 JOHN SUTTON,

15 Respondent.  
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18  
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Case No.: 16cv2491-CAB-NLS

**ORDER: (1) ADOPTING REPORT  
AND RECOMMENDATION [Doc.  
No. 13]; (2) GRANTING MOTION  
FOR LEAVE TO ASSERT  
PROCEDURAL DEFAULTS [Doc.  
No. 11]; (3) REJECTING  
PETITIONER’S OBJECTIONS; (4)  
DENYING PETITION; AND (5)  
DENYING CERTIFICATE OF  
APPEALABILITY**

20 Kenneth Ozua (“Petitioner”), is a state prisoner proceeding *pro se* with a Petition  
21 for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254.  
22 [Doc. No. 1.] On March 28, 2017, Magistrate Judge Nita Stormes issued a Report and  
23 Recommendation (“Report”) to grant the motion for leave to assert procedural defaults  
24 and to deny the Petition. [Doc. No. 13.] On April 25, 2017, Petitioner filed a Traverse.  
25 [Doc. No. 16.] On May 1, 2017, Petitioner filed an objection to the Report. [Doc. No.  
26 18.]

27 Following *de novo* review of Petitioner’s claims, the Court finds the Report to be  
28 thorough, complete, and an accurate analysis of the legal issues presented in the petition.

1 For the reasons explained below, the Court: (1) adopts the Report in full; (2) grants the  
2 motion for leave to assert procedural defaults in the Answer; (3) rejects Petitioner's  
3 objections; (4) denies the Petition for Writ of Habeas Corpus; and (5) denies a certificate  
4 of appealability.

## 5 BACKGROUND

### 6 I. Factual Background

7 The Report contains an accurate description of the crime [Doc. No. 13 at 5-6], and  
8 is hereby incorporated by reference.

### 9 II. State Procedural Background

10 The Report contains a complete and accurate summary of the state court  
11 proceedings, and the Court fully adopts the Report's statement of state procedural  
12 background.

### 13 III. Federal Procedural Background

14 On October 3, 2016, Petitioner filed a Petition for Writ of Habeas Corpus  
15 challenging his San Diego Superior Court conviction. [Doc. No. 1.] On February 7,  
16 2017, Respondent filed an Answer to the Petition, and lodged portions of the state court  
17 record. [Doc. Nos. 10 and 12.] Respondents also filed a motion for leave to assert  
18 procedural defaults in Answer to Petition for Writ of Habeas Corpus. [Doc. No. 11.]

19 On March 28, 2017, Magistrate Judge Stormes issued a Report recommending that  
20 the motion for leave to assert procedural defaults in the Answer be granted, and that the  
21 petition be denied. [Doc. No. 13.] On April 25, 2017, Petitioner filed a Traverse. [Doc.  
22 No. 16.] On May 1, 2017, Petitioner filed Objections to the Report. [Doc. No. 18.] In  
23 his objections, Petitioner requests that the Court consider his Traverse, which was filed  
24 after the Report. Assuming Petitioner has objected to the Report in its entirety, the Court  
25 reviews the Report *de novo*. 28 U.S.C. § 636(b)(1)(C); *Holder v. Holder*, 392 F.3d 1009,  
26 1022 (9th Cir. 2004).

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## DISCUSSION

### I. Legal Standard

The Report sets forth the correct standard of review for a petition for writ of habeas corpus. Under 28 U.S.C. § 2254(d):

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 403, 412-13 (2000).

Under § 2254(d)(1), a state court's decision is “contrary to” clearly established federal law if the state court (1) “arrives at a conclusion opposite to that reached by this Court on a question of law” or (2) “confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours.” *Williams*, 529 U.S. at 405. A state court's decision is an “unreasonable application” if the application was “objectively unreasonable.” *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003).

Under § 2254(d)(2), habeas relief is not available due to a state court's “unreasonable determination of the facts” unless the underlying factual determinations were objectively unreasonable. *See Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003); *see also Rice v. Collins*, 546 U.S. 333, 341-42 (2006) (the fact that “[r]easonable minds reviewing the record might disagree” does not render a decision objectively unreasonable).

### II. Analysis.

#### A. Procedural Default.

Most of Petitioner’s Traverse is dedicated to whether or not his petition is procedurally barred. [Doc. No. 18 at 13-18.] However, this Court agrees with Magistrate

1 Judge Stormes that it is in the “interests of judicial economy” to address the merits of  
2 Petitioner’s claim without determining whether it is procedurally defaulted. [Doc. No. 13  
3 at 13.] Therefore, Petitioner’s objections with regard to procedural default are denied as  
4 moot.<sup>1</sup>

5 B. Merits.

6 Petitioner argues that there was a failure to plead and prove the gang involvement  
7 element of the firearm use enhancement. [Doc. No. 1 at 6-8.] Petitioner argues that he  
8 unknowingly pled guilty to California Penal Code §12022.53(e)(1), which provides:

9 “The enhancements provided in this section shall apply to any person  
10 who is a principal in the commission of an offense if both of the following  
are pled and proved:

11 (A) The person violated subdivision (b) of Section 186.22.

12 (B) Any principal in the offense committed any act specified in subdivision  
13 (b), (c), or (d).”

14 Cal. Penal Code § 12022.53(e)(1) (West 2012); see also Cal. Penal Code § 186.22(b)  
15 (providing for additional terms of punishment for persons convicted of a felony which  
16 was committed for the benefit of, at the direction of, or in association with any criminal  
17 street gang).

18 However, Petitioner was convicted, by plea, of violating Section 12022.53(d),  
19 which provides:

20 Notwithstanding any other provision of law, any person who, in the  
21 commission of a felony specified in subdivision (a), Section 246 or  
22 subdivision (c) or (d) of Section 26100, personally and intentionally  
discharges a firearm and proximately causes great bodily injury, as defined  
23 in Section 12022.7, or death, to any person other than an accomplice, shall  
24 be punished by an additional and consecutive term of imprisonment in the  
state prison for 25 years to life.

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27 <sup>1</sup> Magistrate Judge Stormes recommends rejecting Respondent’s contention that Petitioner’s claim is  
28 barred by *Tollett v. Henderson*, 411 U.S. 258 (1973). For the reasons set forth by Magistrate Judge  
Storms [Doc. No. 13 at 15-16], this Court agrees with the Report and rejects Respondent’s contention  
that Petitioner’s claim is barred by *Tollett*.

1 Unlike Section 12022.53(e), subdivision (d) does not require a violation of  
2 186.22(b). Therefore, Petitioner was not required to admit his involvement in any  
3 gang-related activity for Section 12022.53(d) to apply. As a result, the state  
4 appellate court's adjudication of Petitioner's claim is neither contrary to, nor  
5 involves an unreasonable application of, clearly established federal law, or was  
6 based on an unreasonable determination of the facts in light of the evidence  
7 presented in the state court proceedings. 28 U.S.C. § 2254(d); *Williams*, 529 U.S.  
8 at 412-13; *Miller-El*, 537 U.S. at 340. Accordingly, the Court adopts the Report  
9 and denies the petition.

#### 10 CERTIFICATE OF APPEALABILITY

11 A petitioner complaining of detention arising from state court proceedings  
12 must obtain a certificate of appealability to file an appeal of the final order in a  
13 federal habeas proceeding. 28 U.S.C. § 2253(c)(1)(A) (2007). The district court  
14 may issue a certificate of appealability if the petitioner "has made a substantial  
15 showing of the denial of a constitutional right." Id. § 2253(c)(2). To make a  
16 "substantial showing," the petitioner must "demonstrat[e] that 'reasonable jurists  
17 would find the district court's assessment of the constitutional claims debatable[.]'"  
18 *Beaty v. Stewart*, 303 F.3d 975, 984 (9th Cir.2002) (*quoting Slack v. McDaniel*,  
19 529 U.S. 473, 484 (2000)). Petitioner has not made a "substantial showing" as to  
20 the claim raised by his petition, and thus the Court *sua sponte* denies a certificate  
21 of appealability.

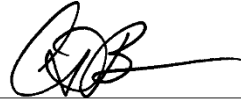
#### 22 CONCLUSION

23 In sum, Petitioner has not established that the appellate court's decision was  
24 contrary to, or involved an unreasonable application of, clearly established federal  
25 law, or was based on an unreasonable determination of the facts in light of the  
26 evidence presented in the state courts. The Court hereby: (1) adopts the Report in  
27 full; (2) grants the motion for leave to assert procedural defaults in the Answer; (3)  
28

1 rejects Petitioner's objections; (4) denies the Petition for Writ of Habeas Corpus;  
2 and (5) denies a certificate of appealability.

3 IT IS SO ORDERED.

4 Dated: June 23, 2017



Hon. Cathy Ann Bencivengo  
United States District Judge